(3)

Supreme Court, U.S.
FILED
JAN 27 2004
OFFICE OF THE CLERK

No. 03-778

IN THE
Supreme Court of the United States

ANTI-DEFAMATION LEAGUE AND
SAUL ROSENTHAL,
Petitioners,

v.

WILLIAM QUIGLEY AND DOROTHY QUIGLEY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

JAY S. HOROWITZ
HOROWITZ, WAKE & FORBES
3950 Republic Plaza
370 Seventeenth Street
Denver, CO 80202
(303) 572-5100

DAVID C. FREDERICK
Counsel of Record
KEVIN J. MILLER
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

LAWRENCE W. TREECE
CHARLOTTE WIESSNER
SHERMAN & HOWARD, LLC
633 Seventeenth Street
Suite 3000
Denver, CO 80202
(303) 297-2900

Counsel for Respondents

January 27, 2004

QUESTIONS PRESENTED

1. Whether, in determining if defamatory statements about non-public figures relate to a "matter of public concern," a court must ignore evidence that the defamatory statements mischaracterized private conversations about a neighborhood dispute and assume the truth of defendant's own interpretation about the dispute.

2. Whether the Federal Wiretap Statute, 18 U.S.C. §§ 2510 *et seq.*, forecloses an award of punitive damages for illegal use of intercepted telephone conversations when one facet of the evidence of wanton, reckless, or malicious conduct is defendants' selective and edited use of those interceptions to defame plaintiffs.

3. Whether sufficient evidence supported an award of punitive damages under the Federal Wiretap Statute against a claim that defendants acted in "good faith" by allegedly obtaining legal advice that intercepting those conversations was lawful.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT 1

REASONS FOR DENYING THE PETITION 14

I. THE "PUBLIC CONCERN" ISSUE DOES NOT WARRANT THIS COURT'S REVIEW 14

A. ADL's Statements Did Not Involve A Matter Of Public Concern 14

B. The Decision Below Is Not In Conflict With Any Other Decision 17

C. This Issue Does Not Warrant Certiorari 21

D. The Wiretap Punitive Damages Award Is Unaffected By ADL's "Public Concern" Issue 23

II. THE WIRETAP STATUTE PUNITIVE DAMAGES AWARD IS PROPER 24

A. ADL's Statutory Challenge Lacks Merit And Is Waived 24

B. Substantial Evidence Independent Of "Defamatory Use" Of Illegally Intercepted Conversations Supports Punitive Damages 26

III. ADL'S CLAIM OF "GOOD FAITH" RELIANCE ON LEGAL ADVICE IS WRONG, FACT-BOUND, AND RAISES NO CIRCUIT CONFLICT 28

CONCLUSION 30

APPENDIX

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) 2

Babb v. Minder, 806 F.2d 749 (7th Cir. 1986) 23

Bartnicki v. Vopper, 532 U.S. 514 (2001) 23, 24

Berenyi v. District Dir., INS, 385 U.S. 630 (1967) 29

Bess v. Bess, 929 F.2d 1332 (8th Cir. 1991) 29

Brasslett v. Cota, 761 F.2d 827 (1st Cir. 1985) 19, 20

Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6, 493 U.S. 67 (1989) 26

Chappel v. Montgomery County Fire Prot. Dist. No. 1, 131 F.3d 564 (6th Cir. 1997) 19, 20

Citron v. Citron, 722 F.2d 14 (2d Cir. 1983) 29

City of Springfield v. Kibbe, 480 U.S. 257 (1987) 21, 24

Connick v. Myers, 461 U.S. 138 (1983) 16

Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967) 23

Dawson v. Delaware, 503 U.S. 159 (1992) 24

Deal v. Spears, 980 F.2d 1153 (8th Cir. 1992) 29, 30

Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981) 15

Denton v. Morgan, 136 F.3d 1038 (5th Cir. 1998) 18, 20

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) 18, 19

Flamm v. American Ass'n of University Women, 201 F.3d 144 (2d Cir. 2000) 21

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) .....*passim*

Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271 (1949) 29

Haring v. Prosise, 462 U.S. 306 (1983) 15

Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989) 23

Hutchinson v. Proxmire, 443 U.S. 111 (1979) 15, 16, 18, 19

International Bhd. of Elec. Workers v. Foust, 442 U.S. 42 (1979) 27

Jacobson v. Rose, 592 F.2d 515 (9th Cir. 1978) 29

Johnson v. Multnomah County, 48 F.3d 420 (9th Cir. 1995) 19, 20

Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991) 23

Pickering v. Board of Educ., 391 U.S. 563 (1968) 18, 20

Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) 18

Schenck v. Pro-Choice Network, 519 U.S. 357 (1997) 27

Smoot v. United Transp. Union, 246 F.3d 633 (6th Cir. 2001) 25, 26, 29

Snead v. Redland Aggregates, Inc., 998 F.2d 1325 (5th Cir. 1993) 18

St. Amant v. Thompson, 390 U.S. 727 (1968) 23

Stevens v. Department of Treasury, 500 U.S. 1 (1991) 24

Time, Inc. v. Firestone, 424 U.S. 448 (1976) 16, 17

Victor v. McElveen, 150 F.3d 451 (5th Cir. 1998) 18, 20

Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083 (1991) 24

Wisconsin v. Mitchell, 508 U.S. 476 (1993) 24

Yee v. City of Escondido, 503 U.S. 519 (1992) 26

STATE CASES

Burns v. McGraw-Hill Broad. Co., 659 P.2d 1351 (Colo. 1983) 23

Denver Publ'g Co. v. Bueno, 54 P.3d 893 (Colo. 2002) 22

Kuhn v. Tribune-Republican Publ'g Co., 637 P.2d 315 (Colo. 1981) 23

Williams v. Continental Airlines, Inc., 943 P.2d 10 (Colo. Ct. App. 1996) 13

STATUTES AND RULES

Communications Assistance for Law Enforcement Act of 1994, Pub. L. No. 103-414, 108 Stat. 4279 5

Federal Wiretap Statute, 18 U.S.C. §§ 2510 *et seq.* 1

18 U.S.C. § 2511 29

18 U.S.C. § 2520(a) 25

18 U.S.C. § 2520(b)(2) 25

18 U.S.C. § 2520(c)(1) 25

18 U.S.C. § 2520(c)(2) 25

Fed R. Civ. P. 51 21

Sup. Ct. R. 14.1(a) 26

INTRODUCTION

This fact-intensive case involves perhaps the most extensive illegal wiretapping scheme litigated under the Federal Wiretap Statute, 18 U.S.C. §§ 2510 *et seq.* After a four-week trial in which it listened to hours of taped intercepted telephone conversations, a jury concluded that petitioners Anti-Defamation League ("ADL") and Saul Rosenthal had maliciously invaded the privacy of respondents William and Dorothy Quigley by orchestrating the unlawful interception and tape-recording of more than 1,200 pages of private telephone conversations. Petitioners then used that material to falsely depict the Quigleys as criminal anti-Semites, committing what the jury found to be an extraordinary number of defamatory statements: 22 separately actionable defamatory statements about Mr. Quigley and 20 about Mrs. Quigley. In findings undisturbed in post-trial motions and on appeal, the jury concluded that petitioners had devised an extensive scheme to distort a dispute between two neighbors – purely private persons who are not public figures – into a cause célèbre intended to promote ADL's own "mission."

Putting aside the striking irony that the jury found ADL liable for defamation, this case involves the application of settled law to a highly unusual set of facts that the court below carefully reviewed, including listening to the tapes of the intercepted calls. Petitioners' effort to transform a private dispute into a "matter of public concern" was properly rejected below and no court has issued a ruling that conflicts with the Tenth Circuit's judgment. Nor does that court's correct application of the Wiretap Statute conflict with the decisions of any other court.

STATEMENT

1. ADL's "Statement" repeats characterizations of the evidence that were expressly rejected by the jury, district court, and court of appeals. The evidence conclusively established ADL's responsibility for vicious defamations and for the illegal interception and use of hundreds of telephone calls. The evidence also decisively proved ADL's

venality in performing those acts. The following statement presents the evidence in the light most favorable to respondents, as this Court is obliged to accept. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604 (1985) (Court "must interpret the entire record in the light most favorable" to the prevailing party).

a. In July 1993, Mr. and Mrs. Quigley and their three young children moved to Colorado when Mr. Quigley, a successful executive in the motion picture industry, became an officer of United Artists, at that time a very large chain of movie theatres. They were the first family to move into a new residential development in Evergreen but quickly established friendships with other families who arrived after them. In early August 1994, Mitchell and Candace Aronson moved into a house one door removed from the Quigleys. The Quigleys greeted the Aronsons warmly, their children played together, and the two families had several barbecues together.

In late August 1994, that relationship materially changed, as Mrs. Aronson turned abusive, vicious, and profane in her dealings with Mrs. Quigley. The trouble began after the Aronsons' dog, Bear, viciously attacked and bloodied the Quigleys' dog, Cody. When Mrs. Quigley asked Mrs. Aronson whether Bear had been vaccinated, Mrs. Aronson responded in a tirade, telling Mrs. Quigley that this was "none of your goddamned business," her children were no longer welcome at the Aronsons' house, and Mrs. Quigley was a "bitch." C.A. App. 2104, 2106. Mrs. Aronson ended her salvo with "fuck you." *Id.* at 2107. From that point on, the Aronsons and their children tormented the Quigleys, whose children became afraid to leave their house. The Aronsons permitted Bear to run wild throughout the neighborhood. At one point, Bear pinned Mrs. Quigley against the door of her car. Mrs. Quigley promptly advised Mrs. Aronson that, if there were any further such incidents, she would "call Animal Control," *id.* at 2121, which she did approximately one week later. The animal control officer served a summons

on the Aronsons and, a week later, responded to another complaint from the Quigleys with another summons. The officer warned Mrs. Quigley to expect retaliation.

The Aronsons did indeed retaliate, in particularly ugly fashion. Throughout October 1994, Mrs. Aronson heaped verbal and profane abuse on Mrs. Quigley as she walked the Quigleys' dog in the neighborhood, screaming that Bear should "get those pieces of shit [Mrs. Quigley and her dog]." *Id.* at 2136. The Aronsons' children encouraged a 16-year-old friend to drive an Aronson SUV directly at Colleen, the Quigleys' 9-year-old daughter, and to beat up Brian, their 14-year-old son. On October 18, 1994, the Aronsons drove their SUV directly behind Mrs. Quigley as she walked down the street, with Mrs. Aronson shouting that Mrs. Quigley was a "fat bitch," a "piece of shit," and a "fucking cunt." *Id.* at 2138. Mrs. Aronson then threatened Mrs. Quigley, "you better watch your ass." *Id.* On October 20, Mrs. Aronson positioned her vehicle to block Mr. Quigley from driving down the street. Pet. App. 6a.

On or about November 1, 1994, Deputy District Attorney Mark Pautler sought to meet with the Quigleys concerning a "neighborhood incident" (C.A. App. 1697), which the Quigleys took to mean the road-blocking incident. Initially angry that the Aronsons had apparently made false charges to the local authorities, the Quigleys then welcomed the meeting as an opportunity to express their fears about the Aronsons. Pautler, who told the Quigleys' lawyer that Mrs. Aronson was a "crazy lady," cancelled two appointments for the meeting. *Id.* at 1812. The rest of November 1994 passed uneventfully, although the Quigleys' fear and concern led them, among other things, to ask neighbors to protect their house against attacks by the Aronsons when they took a weekend trip away.

Neither Quigley ever yelled at or assaulted either of the Aronsons. Mrs. Quigley suffered Mrs. Aronson's verbal assaults in silence while walking her dog or collecting her mail. Neither Quigley ever planned or discussed perform-

ing any criminal or tortious act against the Aronsons. Instead, in private conversations the Quigleys discussed "moving away" (C.A. App. 1680, 1705), and Mrs. Quigley nervously, and sometimes pathetically, vented to her friends about the Aronsons' assaults upon her.

On December 6, 1994, a process server arrived at the Quigleys' home to serve a complaint accusing the Quigleys of assaulting the Aronsons because of their Jewish faith. The next day, Mr. Quigley flew back from a business trip to join his family. That afternoon, the Quigleys watched in horror and with complete befuddlement as ADL – an organization they had no reason before then to think had anything to do with the Aronsons – conducted a televised press conference about the Quigleys themselves! At that conference, regional director Rosenthal accused the Quigleys of having perpetrated a "vicious anti-Semitic campaign" against the Aronsons, which included an alleged threat "to commit bodily harm against the Aronsons." *Id.* at 5178-80. Rosenthal also appeared that evening on a talk show for a radio station whose broadcast signal reached 30 states. Explicitly refusing to identify his source, Rosenthal there stated that facts known to ADL proved, without question, that the Quigleys were vicious and criminal anti-Semites. *Id.* at 5181-200.

In the media frenzy that followed, the Quigleys received a barrage of "hate mail," "death threats," "suspicious looking packages," and a "shoe box of dog defecation." *Id.* at 1709, 1840. Friends ostracized them, and they were forced to hire security guards and to change their lifestyles for their own safety.

b. Sometime in the autumn of 1994, the Aronsons began intercepting and tape-recording private telephone conversations over the Quigleys' home telephone.[1] Trial

---

[1] The Aronsons asserted, but never proved, that they started intercepting the Quigleys' conversations on October 20, 1994, using a store-purchased radio scanner. Evidence at trial suggested that the Aronsons used an enhanced scanner or a different device altogether, and that the Aronsons started intercepting the Quigleys' private conversa-

evidence disclosed that the Aronsons intercepted and tape-recorded even more than the 260 separate telephone conversations they admitted intercepting. Those conversations involved the immediate Quigley family, as well as the Quigleys conversing with their friends, relatives, neighbors, and their lawyer. A small portion of the conversations concerned the Aronsons' assaultive behavior. The great bulk of the conversations concerned pedestrian matters, although some were of an intimate or private nature, including between the Quigleys as husband and wife and about their children's development. The majority, if not all, of the interceptions were illegal.[2]

In late October 1994, the Aronsons escalated the neighborhood dispute they had launched. They contacted ADL, explaining that they had been intercepting and recording the Quigleys' private telephone conversations and that in those conversations the Quigleys were making anti-Semitic comments.[3] Rosenthal was the director of ADL's regional office, which took the Aronsons' call.

Without questioning or investigating the Aronsons' extraordinary allegations[4] or the background of either fam-

---

tions weeks before October 20, 1994. ADL offered no evidence at trial showing that it, or its co-conspirators, ever investigated either point.

[2] On October 7, 1994, Congress passed amendments to the federal wiretap law prohibiting interception of the radio portion of cordless telephone calls which, on October 24th, the President signed into law effective at midnight that night. Pub. L. No. 103-414, § 202(a)(1), 108 Stat. 4290, 4291.

[3] The jury heard evidence purporting to define "anti-Semitism," including definitions by ADL officers and agents. C.A. App. 4526 (ADL Associate Director Towbin) (anti-Semitism does not include the mere use of derogatory reference to person as Jewish but must involve "prejudice and discrimination against a person because they are Jewish"); *id.* at 3783 (Lozow) ("when a person dislikes somebody else because of what they are doing, not because they are Jewish, then the dislike wouldn't necessarily be anti-Semitism"). None of Mrs. Quigley's comments constituted anti-Semitism under those standards, nor did the isolated comment made by Mr. Quigley, *see* note 13, *infra*.

[4] The Aronsons' fantastic allegations included, for example, a plan by the Quigleys to immolate a child and various plans to assault them.

ily, petitioners blindly adopted the Aronsons' description of the Quigleys' conduct, enlisting active ADL members (and attorneys) Gary Lozow and Stuart Kritzer to help. In early November 1994, to chart a course of action ADL conducted two lengthy meetings attended by several ADL local officers, Lozow, Kritzer and their associates, and the Aronsons. Lozow and Kritzer's strategy had three prongs: (1) to "out" the Quigleys with a massive public relations campaign; (2) to punish the Quigleys by causing the DA to press criminal charges; and (3) to make the Quigleys "suffer economically" through a civil suit.[5]

The plan was to engage in a form of extortion: after persuading the DA to bring criminal charges, the conspirators would file a civil lawsuit and seek to settle it by playing the intercepted tapes for the Quigleys and falsely implying that the DA did not have them. ADL directed the Aronsons to continue intercepting and taping the Quigleys' telephone conversations. The conspirators were keenly aware – and explicitly discussed – the "*potentially catastrophic* implications which publicity of the Quigleys' alleged anti-Semitic acts could have on Mr. Quigley's career," particularly because of Mr. Quigley's employment in what the conspirators knew to be an industry populated

---

Many of those allegations stemmed from back-to-back telephone conversations totaling 105 minutes between Mrs. Quigley and Ms. Katie Ughetta on October 20, 1994. The Aronsons produced only an edited five-minute excerpt from the second conversation, less than a minute of which contains speakers engaging in what even one of ADL's witnesses admitted was "venting" and "black humor." C.A. App. 4237-38. Mrs. Quigley explained that the "source" of the comments featured by ADL was radio "shock jock" Howard Stern, who frequently used the imagery of "bars of soap and lamp shades and oven doors" (*id.* at 2178), thus adding to the perversity that ADL had tarred Mrs. Quigley as an anti-Semite for repeating privately the routines that Stern airs publicly.

[5] ADL's trial counsel acknowledged in his opening statement that ADL had "not investigated the matter at all." C.A. App. 1580. Counsel asserted that ADL did not want "to interfere with the normal legal process of the District Attorney's Office." *Id.* The evidence established that ADL itself had initiated and manipulated that DA's process.

with prominent executives of Jewish faith. C.A. App. 5596 (emphasis added).[6]

Between November 7 and December 6, 1994, the Aronsons continued their intercepts, now at the urging of ADL, Kritzer, and Lozow.[7] While ADL "strategized" on an almost "daily basis" (C.A. App. 5179), Lozow and Kritzer transcribed the tapes and parsed the transcripts to concoct "support" for the contrived lawsuit while simultaneously pressuring the DA to pursue criminal charges. In late November and early December 1994, Kritzer and Lozow drafted a civil complaint for the Aronsons to file. On December 5, 1994, they and the Aronsons signed a retainer agreement providing a contingent fee.[8] Early the following morning, the complaint was filed. Shortly thereafter, ADL issued a press advisory entitled, "Major Anti-Semitic Incident Hits Evergreen," which announced a press conference for the following day "about a major case of anti-Semitism and harassment . . . and the lawsuit which has resulted from that case." C.A. App. 5343.[9]

---

[6] Thus, in early November 1994, ADL and its co-conspirators casually discussed the unremarkable fact that people of Jewish faith have enjoyed success in the motion picture industry, which has welcomed them and applauded their talent. Perversely, when Mr. Quigley made a virtually identical remark in an intercepted private conversation, ADL depicted the innocuous comment as reflecting Mr. Quigley's virulent anti-Semitism.

[7] ADL has argued that Lozow "researched" the legality of the wiretapping scheme, but the only evidence of that was conflicting testimony by a series of ADL's co-conspirators, all of whom had been sued by the Quigleys, and none of whom produced any corroborating documentary evidence. *See* p. 29, *infra*.

[8] Notwithstanding that retainer agreement, evidence proved that Lozow and Kritzer represented ADL's interests, not the Aronsons'. The Aronsons subsequently filed suit and claimed that Lozow and Kritzer had a conflict of interest that constituted legal malpractice. This charge was validated when ADL helped to fund Kritzer's and Lozow's settlement of the Aronsons' claims and the $350,000 settlement of the Quigleys' claims against them.

[9] By announcing that ADL would hold a press conference the next day, ADL's strategy ensured that newspapers and other media would

At a press conference attended by a crowd of media representatives on December 7, 1994, Rosenthal read a two-and-one-half page document captioned, "Opening Statement," containing many false and scurrilous statements of fact about the Quigleys. C.A. App. 5344-36. Rosenthal reported to the media that the Quigleys had "threatened to commit bodily harm against the Aronson family . . . [by] asking neighbors to help in acquiring hand grenades and dynamite." *Id.* at 5345.[10] He stated that the Quigleys had actually threatened the Aronsons "dozens" of times, engaged in "planning" to set fire to the Aronsons' children and attempted to "harm" the Aronsons physically.[11] He

---

cover the story. ADL notes the publication of newspaper stories prior to ADL's press conference (Pet. 2, 8, 18), but fails to acknowledge that ADL had brought the filing of the lawsuit (which was, in any event, a lawsuit manufactured by ADL as "cover" for its campaign to "out" the Quigleys) to the papers' attention. C.A. App. 5343.

[10] It was not difficult for the jury, which evaluated those statements years later, to discern the malicious falsity of that statement in particular. The very neighbors referenced by Rosenthal as the supposed armorers – Claude and Sarah Billings – were people with whom the Aronsons continued to socialize throughout this period without any fear whatsoever. The "source" for this statement was a passing comment made during a lengthy conversation with Mrs. Billings in which Mrs. Quigley mentioned a toy potato gun with which all of the neighbors, including the Aronsons, had played. Lamenting the Aronson situation with Mrs. Billings, Mrs. Quigley laughingly queried whether Mrs. Billings' husband was in the military, and quipped that maybe he could provide hand grenades the Quigleys could then lob into the Aronsons' yard with the toy potato gun. The facetious comments were a momentary diversion in a long, dull talk about neighborhood matters. To portray this comment as Mrs. Quigley seeking to acquire a rocket propelled grenade launcher from an arms dealer might be comical had the portrayal not been so damaging.

[11] Contrary to the repeated assertions of ADL (Pet. 1-2, 12, 17) and its *amici* (Br. 9, 10, 14, 15), none of Rosenthal's more than 20 particularized defamatory statements made reference to the Aronsons' lawsuit. Rosenthal asserted as an unqualified *fact* that the Quigleys performed criminal acts, *not* that it was "alleged," "claimed," or "asserted" by plaintiffs in a civil lawsuit that they had done so. We reproduce the Special Verdict Form "A" setting forth the precise statements found by the jury to be defamatory. *See* App., *infra*, 1a-20a.

later repeated many of those "facts" that evening during a lengthy and widely broadcast radio program. C.A. App. 5181-200; *see* App., *infra*, 10a-20a.

ADL reveled in the immediate and continuing success of its deception. A media frenzy ensued, much like that set off when a celebrity is indicted, as opposed to the complete obscurity that accompanies the filing of a civil lawsuit concerning a neighborhood dispute between two unknown private parties. On December 9, 1994, the district attorney responded to Lozow's proddings, and the publicity generated by ADL, by announcing the filing of multiple criminal charges against the Quigleys. The Quigleys thus faced a purported "civil rights" lawsuit filed in federal court, a state criminal prosecution, and an unrelenting media bombardment fueled by ADL. ADL told its staffers "to make hay while the sun shines" (C.A. App. 5383) by "maximizing all opportunities that are available from the Aronson case" (*id.*) – all to generate publicity for ADL's self-aggrandizement. In late 1994, the Quigleys' priest denounced them from the pulpit.

The DA's Office subsequently acknowledged having no case against the Quigleys. After listening to the tapes of the intercepted conversations, the deputy district attorney concluded that Mrs. Quigley's October 20, 1994 conversation with her friend during which they made references to Holocaust-related matters was "simply 'venting' and 'sick humor.'" Pet. App. 22a. In January 1995, the DA dismissed all charges against the Quigleys except one (a reckless driving charge later resolved with a $300 fine). Later that year, the DA and the Jefferson County Sheriff's Department paid the Quigleys $75,000 to settle civil claims brought by the Quigleys. These public agencies also acknowledged, in two public letters unprecedented in Colorado history, that the county had no "evidence, whether admissible in court or not, proving that Mr. and Mrs. William J. Quigley violated Colorado's laws against ethnic intimidation by engaging in anti-Semitic conduct or harassment or by engaging in any other form of ethnic

intimidation against any other religious or racial group. *Our filing and our prosecution of these charges was a mistake. We have apologized to the Quigleys for that mistake.*" C.A. App. 5221 (emphasis added).[12]

That public apology, however, could not undo the harm suffered by the Quigleys. For months they had cowered in their home in fear of the Aronsons' attacks. But, in December and thereafter, they were publicly and maliciously defamed as the attackers *of* the Aronsons, and attackers motivated by religious bigotry. Due to ADL's campaign, Mr. Quigley forever lost a previously untainted and enviable business career, Mrs. Quigley suffered permanently disabling psychological injury, and the Quigleys' lives, including their children's lives, were totally transformed.

In addition, the Quigleys suffered excruciating humiliation. They had had no idea that, for weeks, their most intimate private thoughts had been monitored by the Aronsons, or that a powerful Jewish organization and its agents had secretly dissected their conversations to build a "case" of "ethnic intimidation." Then, after December 7, 1994, ADL thrust them into a public arena in which Mrs. Quigley's private comments became the fodder for public humiliation through ADL's sound bites (repeated most recently in its certiorari petition) that falsely depict her persona. For his part, Mr. Quigley was completely dumbfounded. Often away on business trips, he had never been a party to his wife's banter with her friends.[13] Under-

---

[12] ADL's national director, however, was unrepentant, declaring in an open letter to the press in response to the district attorney's letter that ADL had done the right thing by protecting the Aronsons from "anti-Semites." C.A. Supp. App. 42.

[13] The court below noted that the deputy district attorney concluded that "Mr. Quigley had made no bigoted or racist comments during any of the recorded conversations." Pet. App. 22a. The record reflected only one conversation by Mr. Quigley in which he made any reference even to Judaism, a passing comment about a "Jewish" "old boys' network" in the film industry. *Id.* at 13a (citing C.A. App. 5746). That innocuous comment (which had nothing to do with the Aronsons), was entirely distorted by Rosenthal, who proclaimed without any support

standably, he was astounded to hear Rosenthal catalog to an impressionable public the many criminal "acts" *Mr. Quigley* had committed – all a complete fiction.[14]

2. In January 1995, in response to the "Aronsons'" lawsuit, the Quigleys added Federal Wiretap Statute claims against Rosenthal (later expanded to ADL) and state law claims for defamation and invasion of privacy. In a month-long trial, ADL repeatedly referred to snippets of Mrs. Quigley's taped conversations, which ADL synthesized, for effect, and reproduced on a compact disc. But the jury listened to the entire tapes and read the transcripts. It well perceived that Mrs. Quigley's private venting – in context – stemmed from her frustration and fear at being trapped in a neighborhood where the mere act of walking her dog brought her face to face with a neighbor relentlessly attacking her.[15] ADL also argued to the jury

---

that "Mr. Quigley repeatedly has expressed his animus towards individuals of the Jewish faith." *Id.* at 19a; *see also id.* at 18a. The court of appeals observed as well that in only eight of her conversations (which constituted the vast majority of the 260 intercepted and taped) did Mrs. Quigley make any reference to Judaism. *Id.* at 13a.

[14] From its December 7, 1994 defamatory statements to its certiorari petition, ADL has consistently lumped the Quigleys together. ADL baselessly asserts here that "*Respondents discussed burning scarecrows and crosses on the Aronsons' property, throwing soap bars and lamp shades in their yard, taping an oven door to their house*, and otherwise 'taking some type of physical action toward the Aronsons or their home.'" Pet. 2 (quoting Pet. App. 13a) (emphasis added). The italicized words referred to the 40 seconds of almost inaudible banter between Mrs. Quigley and her friend Ms. Ughetta (as they described it themselves during the actual conversations – "sick, sick, sick") on October 20, 1994, which ADL lifted from the lengthy conversations. ADL has never produced any evidence suggesting that Mr. Quigley knew about those statements, let alone was a party to them. ADL simply merges two persons into one and attacks both.

[15] ADL's central defense, that Mrs. Quigley made ugly and occasionally anti-Semitic comments, was largely irrelevant to the Quigleys' claims and did not support any cognizable defense (even ADL's lame assertions that their palpably false statements were "true"). The Quigleys never disputed that Mrs. Quigley made many of the comments attributed to her (although the Quigleys did strongly challenge ADL's characterization of them and ADL's conduct in appropriating, and then

that its "mission" and "importance" justified its wiretapping and publishing of dozens of false and defamatory statements. But the jury understood that an organization like ADL that holds itself out as "venerable" (Pet. 1) is in a unique position to know the devastating impact of branding innocent persons as anti-Semitic. ADL's power and prestige counseled prudence, but the jury saw evidence of gross recklessness. In addition, the jury undoubtedly was impressed by testimony, particularly by the Quigleys' neutral rebuttal witnesses, that firmly established the falsity of the trial testimony of ADL's principal co-conspirators, the Aronsons. Based on that evidence, the jury reached a firm conclusion that, as performed against the Quigleys, ADL's "mission" was a travesty; that ADL was guilty of malicious conduct through its wiretapping and defamations; and that, even under a "beyond a reasonable doubt" standard applied to the state law charges, ADL was guilty of activity that "shocked the conscience."

At an extended conference, the district court rejected nearly all of the Quigleys' proposed instructions and adopted most of petitioners'. And after the instructions were given to the jury, petitioners made no objection. Moreover, at petitioners' request, the district court used a general verdict form for the jury to set forth a single award of compensatory damages on all of the Quigleys' claims and a single and separate award of state punitive damages on those claims. In their post-trial motion, petitioners advanced a range of contentions, none of which it now pursues before this Court.

3. Reflecting its understanding that the district court's rulings on issues of law were fundamentally correct, on appeal ADL principally challenged the sufficiency of the evidence and devised new legal arguments not made at

---

altering, these private comments). The Quigleys claimed that ADL had defamed them by stating, falsely and slanderously, that the Quigleys had performed criminal acts, planned to perform other criminal acts, and threatened the Aronsons.

trial. The Tenth Circuit affirmed in substantial part.[16] After a detailed recitation of a number (but by no means all) of the facts that had been adduced at the trial, the court rejected the bulk of petitioners' arguments on various grounds, which often included waiver.[17]

a. The court concluded that, under Colorado law, ADL's defamatory statements "did not involve matters of 'public concern.'" Pet. App. 25a. Explaining that it was undisputed that "the Quigleys were private individuals at the time the alleged defamatory statements were made," *id.* at 27a, the court framed the issue as whether petitioners' statements involved matters of public concern which, under Colorado law, would require the Quigleys to prove actual malice to establish ADL's liability for defamation, *id.* at 27a-28a. The court observed that Colorado law requires that "'the balance should be struck in favor of a private plaintiff if his or her reputation has been injured by a non-media defendant in a purely private context.'" *Id.* at 29a (quoting *Williams v. Continental Airlines, Inc.*, 943 P.2d 10, 17 (Colo. Ct. App. 1996)). Based on its *de novo* review of the entire record, the court concluded that petitioners' defamatory statements concerned an "inherently private" matter. *Id.* at 44a.

As to punitive damages under the Federal Wiretap Statute, the court noted that the district court had instructed the jury to award punitive damages only if petitioners were found to have "acted wantonly, recklessly, or maliciously," *id.* at 46a (internal quotation marks omitted), a standard consistent with the three circuit and multiple district court decisions to have addressed the issue.

---

[16] Based on its interpretations of Colorado law and an intervening Colorado Supreme Court decision, the court reversed judgments on the Quigleys' state law invasion of privacy by intrusion and false light invasion of privacy claims, but affirmed the remainder of the judgment.

[17] Each argument raised by petitioners here is a new one not raised below in its current form. We address waiver in the argument sections. Here we briefly summarize aspects of the Tenth Circuit's opinion that touch on petitioners' newly raised claims.

Id. (collecting cases). The court noted that ADL had never challenged the punitive damages instruction.

The court also rejected ADL's argument (presented to, and rejected by, the jury as a factual defense) that the good faith belief of Lozow and Kritzer in the lawfulness of the interceptions prevented the imposition of punitive damages under the statute. The court found ADL's other objections to the award of punitive damages under the statute either to have been waived or to lack merit. Pet. App. 54a-56a.[18]

b. The Tenth Circuit denied petitioners' en banc petition without dissent or recorded vote in favor of rehearing.

REASONS FOR DENYING THE PETITION

ADL raises three new issues not raised or passed on below in their current form. Those new arguments are waived, and, in any event, meritless and fact-bound. No other court has issued a ruling that conflicts with the decision below on the two (of three) issues on which ADL attempts to assert a "conflict."

I. THE "PUBLIC CONCERN" ISSUE DOES NOT WARRANT THIS COURT'S REVIEW

A. ADL's Statements Did Not Involve A Matter Of Public Concern

The Tenth Circuit conducted a *de novo* review of the record – including listening to the tapes – to conclude under Colorado cases that ADL's defamatory statements were not about a matter of public concern. Pet. App. 25a-33a. Even if that decision somehow raised a federal law is-

---

[18] Judge Hartz dissented in part. Not focusing upon the critical fact that the Quigleys' comments were private conversations made by private persons, Judge Hartz believed the defamation claim should be vacated. He also stated that the federal statutory punitive damages award should be reversed. The latter opinion was based on an instructional error claim by ADL that the majority rejected and that ADL has now abandoned. Pet. App. 60a-61a. Judge Hartz joined the rest of the majority's opinion.

sue,[19] the court correctly ruled that "it is apparent after listening to those recorded conversations that the Quigleys were engaging in what they thought was *private discussion with each other* or with friends and family regarding their ongoing dispute with the Aronsons." *Id.* at 44a (emphasis added). That determination of the factual context of the Aronson-Quigley dispute was a fundamental predicate to the court's legal conclusion that ADL's defamatory statements about "recorded telephone conversations" concerned "purely private matters." *Id.* at 55a.

The Tenth Circuit's decision correctly applied the principle that the matter of public concern must exist independent of the speech itself. *See Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979). The courts below made the determination that ADL's speech concerned private matters by assessing the circumstances surrounding ADL's statements. Pet. App. 29a-33a. That record revealed that the Quigleys "did not thrust [themselves] or [their] views into public controversy to influence others," and that the Quigleys' private telephone conversations that ADL falsely portrayed were not about a "particular controversy" of general public interest. *Hutchinson*, 443 U.S. at 135.

In the court below and in its petition (at 16-17), ADL has argued that, because the defamatory statements "as-

---

[19] ADL never argued at trial or on appeal that the First Amendment required the Quigleys to prove "actual malice" to support punitive damages for a defamation claim. ADL never cited *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), until its court of appeals brief (at 54), and even then did not do so to contest punitive damages for the state defamation claims. The majority and dissent below agreed that ADL's appeal on defamation implicated only Colorado law. Pet. App. 25a-27a; *id.* at 62a (Hartz, J.). Even in its rehearing en banc petition, ADL argued that, "[l]eft uncorrected, the panel's novel construction of Colorado's public or general concern standard will bind federal courts throughout this Circuit to misapply Colorado law, to the detriment of all Colorado citizens." ADL C.A. En Banc Pet. 8-9. The state law issue here thus merits no further review. *See Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) (Court does not review state law issues). And ADL's newfound federal argument has been waived. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).

serted that Respondents were engaged in a concerted anti-Semitic campaign of harassment and intimidation," the mere making of this assertion itself elevated ADL's defamations to a matter of public concern. That position, however, was rejected by this Court in *Hutchinson*, which held that a general subject matter – there, the use of public funds – could not be invoked to transform a private matter into a public one. As the Court explained, "[t]he 'use of such subject-matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area.'" 443 U.S. at 135 (quoting *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976)). *See also Connick v. Myers*, 461 U.S. 138, 148 (1983) (private disputes do not involve matter of public concern). As the Court has concluded, "those charged with defamation cannot, by their own conduct, create their own defense." *Hutchinson*, 443 U.S. at 135.[20]

The Tenth Circuit also properly rejected ADL's assertion that its statements concerned a lawsuit. Pet. App. 29a-31a. That defense has no merit. None of the defamatory statements found by the jury referenced the Aronsons' lawsuit, and the lawsuit itself was a concoction by ADL that had no factual predicate and was instituted as a cover for ADL's public smear campaign. *See* App., *infra*, 1a-20a; Pet. App. 42a n.11, 48a-49a. ADL and its *amici* repeatedly characterize the statements as speech about a lawsuit, while never citing or quoting the precise statements found by the jury to be defamatory.[21] In any event,

---

[20] The rule advocated by ADL could have harmful policy implications, because it would allow a defendant to create its own privilege through its false statements. Because ADL's "mission" (Pet. 3) is to expose anti-Semites, ADL functionally argues that every false statement it makes to expose such persons is entitled to the heightened requirements of the actual malice standard, regardless of ADL's complete lack of any evidence to support such a claim.

[21] *Compare* Pet. 17 (asserting that ADL's defamatory speech "took two forms: allegations in the Aronsons' civil complaint, which excerpted portions of Respondents' recorded telephone conversations, and

this Court has rejected the notion that "all judicial proceedings [constitute] matters of 'public or general interest.'" *Time, Inc.*, 424 U.S. at 455.

B. The Decision Below Is Not In Conflict With Any Other Decision

To demonstrate its asserted circuit "conflict," ADL must show that three crucial premises underlying its argument are correct: that the Tenth Circuit announced a "*per se*" rule in which public concern status turns on the "truthfulness" of the speech (Pet. 18); that courts in fact have held that the "speech at issue" alone can serve as the basis for establishing that it is about a matter of public concern (*id.*); and that federal decisions in the public employment context create a "conflict" with this defamation case (*id.* at 18-20). Each premise is wrong.

1. The Tenth Circuit did not announce a "*per se*" rule that false speech can never be considered to relate to a matter of public concern. *Compare* Pet. 18 *with* Pet. App. 32a-33a (based on record establishing that ADL was "intimately familiar" with the allegations against the Quigleys, the court held that ADL "knew or should have known" that any assertions "of racial discrimination/harassment were not colorable"). ADL bases its argument on a mischaracterization of two sentences in the Tenth Circuit's opinion. *See* Pet. App. 32a-33a. Properly understood, those sentences reflected the court's indulgence in considering ADL's incorrect argument that its defamatory statements must be assumed to be true in determining "matter of public concern." The court rejected that argument here because evidence showed that ADL's statements are so attenuated from reality that they lack even a "colorable basis" and that ADL itself had concocted the notion of the Quigleys' purported "racial discrimina-

---

Petitioners' statements to the press about the lawsuit's allegations") *with* App., *infra*, 1a-20a (jury verdict form showing that none of the defamatory statements found by the jury referenced or quoted the lawsuit's allegations as such.)

tion/harassment." *Id.* at 33a. ADL then took that fabricated accusation, devised a sham lawsuit, and attempted to use the lawsuit as "cover" for its public relations smear campaign. ADL was unable to persuade the jury that there was any truth for its invention charging the Quigleys with ethnic hostility. This Court similarly should not back away from *Hutchinson* to permit ADL to exploit important constitutional rights intended to benefit well-intentioned speakers by affording ADL's malicious invention heightened constitutional protection. *See Hutchinson*, 442 U.S. at 135; *Snead v. Redland Aggregates, Inc.*, 998 F.2d 1325, 1330 (5th Cir. 1993).

2. No decision cited by ADL stands for the proposition that a court must decide, based entirely upon the statements in isolation, whether they are about a matter of public concern. Indeed, it is universally settled that surrounding circumstances matter – the speech has to be "about," "concerning," "involving," or "on" a "matter of public concern."[22] All of the cases cited by ADL address topics of obvious public import, based on the facts and circumstances presented. None of those cases examines the allegedly false statements in isolation, divorced from context, to determine whether they address a matter of public concern.[23] ADL cites no case accepting its far-reaching

---

[22] *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 751, 756 (1985) ("a libel that involved a matter of public concern"; "expression on a matter of . . . public concern"; "expression concerned a public issue"); *Gertz*, 418 U.S. at 331 n.4 ("defamatory charge . . . concerned no issue of public or general interest"); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) ("comment on matters of public interest"); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44-45 (1971) ("whether the utterance involved concerns an issue of public or general concern").

[23] Indeed, in all of those cases, the courts took into account factors for why the matter at issue was of public concern that went well beyond the employee's statements about it. *See, e.g., Victor v. McElveen*, 150 F.3d 451, 456-57 (5th Cir. 1998) (racial discrimination in police force was matter of public concern in light of existing police policies, assignments of officers, and other external evidence); *Denton v. Morgan*, 136 F.3d 1038 (5th Cir. 1998) (complaints to state education

position that a reviewing court must assume as true the "interpretation" that a speaker offers of an event without regard to the surrounding circumstances. No court has held that, no conflict among the circuits exists on that point, and to adopt that position would conflict with *Hutchinson* and undermine the constitutional balance established in *Gertz*.

3. The "conflict" presented in the cases cited by ADL is unique to public employment law and does not arise in the defamation context, which is why all of the cases (except one) cited by ADL involve public employment speech and not defamation.[24] As *Brasslett* observed, the Supreme Court has "recognize[d] that the government's interest as an employer in regulating employee speech differs from its interest in regulating the speech of the general citizenry." 761 F.2d at 839. In public employee discharge cases, the First Amendment is directly implicated by an employee's speech precisely because that speaker, who typically has "special access to facts relevant to debates on issues of public concern," is being punished by the government. *Johnson*, 48 F.3d at 424. To balance the employee's constitutional rights and the public's interest in information about government operations against the

---

agency that a particular detainee was being denied education rights by office managers viewed in context of probation office policies and nature of misconduct alleged); *Chappel v. Montgomery County Fire Prot. Dist. No. 1*, 131 F.3d 564, 574-78 (6th Cir. 1997) (evaluating statements about mismanagement of public funds by examining motive of speaker, possibility of public corruption, timing of allegations that coincided with receipt of public grant funds and fiscal review, and importance of topics to local agency); *Johnson v. Multnomah County*, 48 F.3d 420, 425-26 (9th Cir. 1995) (mismanagement and possible criminal conduct by public official held critical for public concern inquiry); *Brasslett v. Cota*, 761 F.2d 827, 844-45 (1st Cir. 1985) (equipment failures and needs of city's fire department).

[24] ADL contends that the First Amendment inquiry into whether speech addresses a matter of public concern should be the same in all contexts. This Court has never held that, and certainly the plurality opinion cited by ADL stands for no such proposition. Pet. 25 (citing *Dun & Bradstreet*, 472 U.S. at 761 (plurality op.)).

government's need to promote efficiency in its workforce, this Court has devised a test to assess: (1) whether the employee's speech is about a matter of public concern, thereby triggering First Amendment considerations; and (2) if it is, whether the public employer's justifications for taking adverse action are sufficient to overcome the employee's speech interests. *See Pickering*, 391 U.S. at 568.

Thus, the "conflict" cited by ADL concerns merely whether the falsity of the employee's speech is analyzed at the first or second stage of the *Pickering* balancing analysis. ADL quotes (at 18) a snippet from *Johnson*, but omits the remainder of the sentence which states this obvious, albeit crucial, point: "The Circuits appear to be split on whether, in light of *Connick*, recklessly false statements are per se unprotected *or whether the recklessness should be considered as one of the factors in the Pickering balance of interests.*" 48 F.3d at 423 (emphasis added). Some courts hold that falsity of speech can foreclose public concern status; other courts hold that falsity of speech is relevant only in evaluating whether the government is justified in taking adverse action. But at *some* point in the First Amendment analysis in public employment cases, all courts hold that falsity of speech becomes relevant. *See, e.g., id.*; *Denton*, 136 F.3d at 1043; *Brasslett*, 761 F.2d at 844. The only practical significance to the "conflict," therefore, is in whether the government will be forced to justify its adverse action against the employee. This Court appears to have recognized that this is a "conflict" only in the most theoretical sense, because even though the Ninth Circuit in *Johnson* recognized nine years ago the different approaches among the circuits, this Court has not seen fit to address it in light of three subsequent decisions (*Chappel*, *Denton*, and *Victor*) that directly raise the issue where it is relevant – the public employment context. ADL points to no case where the outcomes differed depending on when falsity was factored into the court's analysis.

No matter how that public employment issue ultimately may be resolved, it will have no bearing on how "matter of public concern" is used to gauge whether a defamation defendant is entitled to an actual malice instruction before punitive damages may be awarded. *See Gertz*, 418 U.S. at 349-50. Obviously, in a defamation case where the jury has already found liability, the speech by definition is "false." It would be surpassingly strange for a court – once the jury found a defamation defendant's speech to be false for liability purposes under state law standards – to then require a presumption of truth for that false speech so that the "public concern" issue would be decided under federal law without any reference to any facts other than the words of the defamatory statement. ADL offers no case to support that notion, and the cases it does cite in the public employment context in no way create a "split" with the decision below.[25]

C. This Issue Does Not Warrant Certiorari

Even if ADL's cobbled together "conflict" was relevant here, the "public concern" issue still would not warrant this Court's attention. First, ADL failed to submit a punitive damages instruction for actual malice and it received the instructions it did request. *See* Fed. R. Civ. P. 51. That counsels strongly against further review. *See, e.g.*, *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) ("[T]here would be considerable prudential objec-

---

[25] Nor is there any conflict with *Flamm v. American Ass'n of University Women*, 201 F.3d 144 (2d Cir. 2000), which focused principally on whether a defamatory statement expressed an "opinion" protected by the First Amendment or "facts" susceptible to defamation liability. In *Flamm*, the court held that the speech was about a matter of public concern because it purported to state "facts" about an attorney's ability to serve plaintiffs in discrimination cases. The court there invoked a common law rule that has no application here: "publications commenting on 'persons who present[ ] themselves or their services or goods to the public' are matters of public concern." 201 F.3d at 150. The Quigleys manifestly do not fit within that description.

tion to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested.").

Second, the district court *did* instruct the jury to determine whether ADL had acted with "actual malice" in connection with the Quigleys' state law claim alleging invasion of privacy/false light, which required an instruction identical to what this Court has required for "actual malice": "[Y]ou must find that the defendants had knowledge of or acted in reckless disregard as to the falsity of the matters the defendants publicized about the plaintiff." C.A. App. 5023. *Cf. Gertz*, 418 U.S. at 349 (defining actual malice standard with same terms). The jury had to find that element "by clear and convincing evidence." C.A. App. 5023-24.[26]

Third, overwhelming evidence proved actual malice. Courts have pointed to numerous factors to establish actual malice, nearly all of which were proved by the Quigleys: petitioners' unquestioning acceptance, without any investigation, of the Aronsons' inherently incredible story; petitioners' tarring of Mr. Quigley with no evidence that he had uttered a single ethnically insensitive remark; ADL's knowing decision not to listen to the tapes; and the conscious disregard by Lozow and Kritzer, who did listen to the tapes, of the conversants' own characterization of

---

[26] ADL acknowledges this fact (at 11 n.7), notes only that the Tenth Circuit reversed this claim, and omits that the reason the claim was reversed on appeal was because an intervening Colorado Supreme Court decision held that the false light tort "substantially overlaps" with defamation. *Denver Publ'g Co. v. Bueno*, 54 P.3d 893, 898 (Colo. 2002) (en banc). Significantly, the Colorado court based its ruling in part on the fact that the *scienter* requirement under this tort was identical to the "actual malice" requirement applied in Colorado defamation cases. *See id.* at 899. Thus, when the jury found that all of the elements for false light had been proved, it necessarily found evidence of actual malice to support defamation. The *Denver Publishing* holding, therefore, in no way diminishes the significance of the jury's finding as fact that ADL acted with "actual malice."

their remarks as "sick" and of the obvious bantering tone conveyed by the conversants.[27]

D. The Wiretap Punitive Damages Award Is Unaffected By ADL's "Public Concern" Issue

Recognizing that the punitive damages on the state law defamation claims are but a small fraction of the overall damages award, ADL endeavors to bootstrap its defamation-related matter of public concern contention into an attack upon the federal wiretap punitive damages award. ADL asserts that "the majority affirmed the jury's $7.5 million punitive damages award . . . on a defamation theory – *i.e.*, that ADL 'used the snippets of [intercepted] conversation[s] [in the Aronsons' complaint] to falsely portray the Quigleys as anti-Semitic extremists.'" Pet. 17 (quoting Pet. App. 52a). Not only is that assertion wrong, *see* pp. 27-28, *infra*, but ADL's position would have sweeping and unprecedented consequences if accepted. First, ADL points to no case extending *Gertz* outside the defamation context to require an actual malice instruction before punitive damages may be awarded for causes of action other than defamation. In *Bartnicki v. Vopper*, 532 U.S. 514 (2001), this Court suggested the exact opposite approach would apply to claims under the statute, by limiting its extension of First Amendment protection only for innocent disclosures of illegally intercepted conversations

---

[27] *See, e.g., Kuhn v. Tribune-Republican Publ'g Co.*, 637 P.2d 315, 317 (Colo. 1981) (evidence of failure to pursue easily available avenues of corroboration); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 691-92 (1989) (purposeful avoidance of the truth); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (not reviewing tape recordings); *Burns v. McGraw-Hill Broad. Co.*, 659 P.2d 1351, 1362 (Colo. 1983) (precipitous publication notwithstanding no time pressure); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 158 (1967) (publisher's motive to self-aggrandize or to change its image); *Babb v. Minder*, 806 F.2d 749, 755-56 (7th Cir. 1986) (publishing in the face of evidence of the "great potential for harm" the publication will cause); *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) (circumstances where the "allegations are . . . inherently improbable" and "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports").

and reaffirming the statute's purpose of protecting against intrusions on privacy. *See id.* at 525, 540.

Second, ADL's selective editing of the tapes establishes ADL's "wanton, reckless or malicious" state of mind, and does not implicate any First Amendment protections whatsoever. *See, e.g., Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (upholding penalty enhancement for racially based rape as "content neutral"); *Dawson v. Delaware*, 503 U.S. 159, 165 (1992) ("[T]he Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.").

Third, this issue has been waived. ADL raised this issue for the first time in the court of appeals, which noted that it was unclear whether the issue had been raised at trial, and then alternatively and summarily rejected it on the merits. Pet. App. 55a. Although ADL asserts (at 14 n.9) that the court's consideration has preserved the issue for review, that position draws no support from *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (a case in which the court of appeals had "concluded that respondents were entitled to sue"), or *Stevens v. Department of Treasury*, 500 U.S. 1, 8 (1991) (rejecting respondent's argument that issue was raised in this Court "for the first time"). In fact, ADL did not object at trial to the punitive damages instructions for failure to instruct on actual malice, and the court of appeals' comments on the point do not cure ADL's failure to timely object. *See Kibbe*, 480 U.S. at 259.

II. THE WIRETAP STATUTE PUNITIVE DAMAGES AWARD IS PROPER

A. ADL's Statutory Challenge Lacks Merit And Is Waived

1. In creating a private right of action for "damages" and "punitive damages" in favor of "any person whose wire, oral, or electronic communication is intercepted, dis-

closed, or intentionally used in violation" of the Federal Wiretap Statute, 18 U.S.C. § 2520(a), (b)(2), the statute nowhere forecloses actual or punitive damages for the tortious "use" of an illegally intercepted communication.[28] That legislative choice is entirely logical. Nearly all "uses" will involve "selectivity," as the defendant parses those portions of the interceptions that suit his purpose. Moreover, the use of intercepted conversations could facilitate theft, fraud, conspiracy to violate antitrust laws, or a host of other civil actions. The intrusion on privacy – the purpose of the statute – is no less implicated because the defendant uses the interceptions to commit an additional tort requiring proof of different elements.[29] Petitioners cite no statutory language or case law preventing respondents from obtaining punitive damages for the malicious use of excerpts from intercepted conversations. Pet. 27-28. The only court to address an issue like the one posed by ADL here has expressly recognized that punitive damages under the statute may be based on use that causes "harm to reputation." *Smoot v. United Transp. Union*, 246 F.3d 633, 648 (6th Cir. 2001).[30]

---

[28] Indeed, the statute expressly provides a safe harbor with limited damages if the offending conduct was "*not* for a tortious or illegal purpose," 18 U.S.C. § 2520(c)(1) (emphasis added), a provision indicating Congress's intent to provide full actual and punitive damages when a violator has such a "tortious or illegal purpose," *see id.* § 2520(c)(2).

[29] ADL's newfound "issue" here also presents a case of invited error. ADL opposed the Quigleys' efforts to try their Wiretap Statute claims before a separate trial would address the defamation claims. By forcing the claims to be tried together, and without requesting any type of limiting instruction, ADL caused the very intermingling of "defamation" with illegal "use" about which it now complains.

[30] Petitioners mischaracterize *Smoot* as upholding the punitive damages award for "defamatory" use "*only* where the party was specifically 'on notice that disclosure . . . was illegal.'" Pet. 28 n.17 (quoting 246 F.3d at 648) (emphasis added). The Sixth Circuit nowhere said that, and indeed clearly treated the use to harm reputation and the knowingly illegal disclosure as "two grounds" for awarding punitive damages. 246 F.3d at 648 (upholding both grounds). Of course, if ADL's construction of the statute had any merit, both grounds would

2. ADL's argument was waived long ago. From the first filing of this lawsuit in January 1995, respondents have complained about ADL's "use" of intercepted conversations in a selective and pernicious manner. Only now does ADL argue that the Federal Wiretap Statute prohibits the award of punitive damages for what ADL characterizes as the "defamatory use" of illegally intercepted communications. Pet. 27. ADL never objected at trial, and its arguments on appeal addressed wholly different constitutional challenges that the Tenth Circuit rejected as waived and/or meritless. Pet. C.A. Br. 53-55.[31] ADL's present argument that, *as a matter of statutory construction*, the statute forecloses punitive damages for "defamatory use" of illegally intercepted communications is therefore waived. This Court does not "pass on" claims that were "neither presented to nor decided by the Court of Appeals below." *Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 94 n.18 (1989).

B. Substantial Evidence Independent Of "Defamatory Use" Of Illegally Intercepted Conversations Supports Punitive Damages

Even if respondents are somehow precluded from obtaining punitive damages under the Federal Wiretap Statute for "defamatory use,"[32] the award was based on overwhelming evidence of malicious, wanton, or reckless conduct wholly independent of the defamatory use of por-

---

have been irrelevant, because a "knowing" violation would no more support punitive damages for defamatory use than a violation without intent. Not only does *Smoot* present no circuit conflict, therefore, it affirmatively supports the Tenth Circuit's judgment below.

[31] The court below noted ADL's failure to raise a due process issue in the district court and that it was unclear whether ADL had raised a First Amendment challenge there. The court nonetheless alternatively rejected those arguments on the merits. Pet. App. 55a-56a & n.17.

[32] Because ADL challenges neither the punitive damages instruction nor the size of the award, neither issue is before the Court. *See* Sup. Ct. R. 14.1(a); *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992).

tions of the intercepted conversations.[33] In defending the award, respondents may rely "on any ground which the law and the record permit." *Schenck v. Pro-Choice Network*, 519 U.S. 357, 384 n.12 (1997) (internal quotation marks omitted). Thus, even assuming the court below gave the "wrong reason" (*id.*) for upholding punitive damages – which it did not – the award must nevertheless be upheld as supported by substantial evidence independent of "defamatory use."

Under the concededly correct punitive damages instruction given by the district court, the jury found that ADL acted "wantonly and recklessly" (C.A. App. 5047-48; Pet. App. 53a), a standard that encompasses evidence tending to show ADL's motive and intent, and the nature and seriousness of the injury it caused. That evidence demonstrated: (1) ADL's stated purpose to "out" the Quigleys for no reason other than Mrs. Quigley's private use of language ADL found offensive; (2) ADL's complicity with the Aronsons in continuing the illegal wiretaps; (3) ADL's decision to accuse Mr. Quigley of being an anti-Semitic terrorist, when, in fact, he uttered not one ethnically tinged statement during the multitude of intercepted conversations; (4) ADL's acting with knowledge of the cataclysmic effect its action would have on Mr. Quigley's career, even though it knew he had no involvement in Mrs. Quigley's comments; (5) ADL's development of an extortion plan to trick the Quigleys into paying the Aronsons money through a deception about whether the DA possessed the interceptions; (6) ADL's decision to ensure that news of

---

[33] ADL erroneously (at 27-28) contends that the Tenth Circuit limited its affirmance of punitive damages to the "defamatory use" of intercepted snippets. In fact, the court cited additional factors, such as Lozow's and Kritzer's intent to harm the Quigleys. Pet. App. 50a-53a, 56a & n.17. There is no reason for this Court to question that judgment. *See, e.g., International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 46 n.7 (1979) (Court "unwilling to substitute our judgment for that of the jury, District Court, and Court of Appeals on" the "essentially evidentiary question" whether there was sufficient evidence "to justify the jury's punitive damages award").

Mr. Quigley's virulent anti-Semitism was published in the two most widely circulated trade journals in Mr. Quigley's industry, to maximize damage to him; (7) ADL's self-aggrandizing desire to "capitalize" on this opportunity to justify its own mission – "to make hay while the sun shines," as Rosenthal instructed his staff; (8) ADL's blatantly false portrayal of the "matter" locally as the most egregious act of anti-Semitism in the Denver area since the tragic murder of Alan Berg; (9) ADL's manipulation of the district attorney into filing baseless criminal charges; (10) ADL's abuse of its stature in attacking powerless people, thereby exacerbating the damages inflicted upon them; and (11) ADL's unrepentant and arrogant defense at trial in which ADL simply repeated its slanders. As the courts below properly concluded, that evidence amply sustained the jury's punitive damages award, given ADL's "conscious disregard" of the Quigleys' privacy interests protected under the Wiretap Statute.

III. ADL'S CLAIM OF "GOOD FAITH" RELIANCE ON LEGAL ADVICE IS WRONG, FACT-BOUND, AND RAISES NO CIRCUIT CONFLICT

A. Overwhelming evidence supported the properly instructed jury's decision to award punitive damages for ADL's "wanton, reckless, or malicious" conduct. Notwithstanding the extended disputes of fact at trial – ADL put on five witnesses to support that defense, and the Quigleys contested the veracity of each one – ADL never claimed below that good faith reliance presented an issue of law, as opposed to a question of fact for the jury to resolve.[34] When the jury assessed punitive damages under

---

[34] The court of appeals also properly rejected ADL's "good faith" reliance argument by concluding that ADL never presented any evidence that its lawyers had researched the legality of *using* intercepted conversations, which the court found to be a distinct inquiry from whether an *interception* is legal. Pet. App. 51a-52a & n.15. ADL seeks to blur this issue in the petition, asserting that Lozow's "research" included "interception *and use*." Pet. 25 (citing Pet. App. 12a) (emphasis added); *see also id.* at 7, 26. But in doing so, ADL offers no evidence demonstrating error by the court below. Pet. App. 51a-52a & n.15.

the correct standard,[35] it weighed the substantial evidence that ADL's lawyers had been involved in a scheme to "out" the Quigleys with the intent to destroy Mr. Quigley's career against ADL's dubious protests that they acted in "good faith." Tellingly, by its selection of words to depict its claim, ADL effectively concedes that the issue is factual. Pet. 25-26 ("diligently researched," "consulted with" DA, "implicitly reaffirmed these assurances," "the facts of this case," and "this record" show ADL's "good faith"). And, ADL's exaggerated and inaccurate descriptions of the proof purportedly showing ADL's "acute[] concern[]" about legality and its lawyers taking "great pains" (*id.* at 26) reflect credibility determinations entrusted to a jury that rejected those characterizations. ADL's closing argument of facts to this Court is two courts too late. *See Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949); *Berenyi v. District Dir., INS*, 385 U.S. 630, 635-36 (1967).[36]

B. ADL also asserts (at 27) for the first time in this litigation that the Wiretap Statute forecloses punitive damages "as a matter of law" because of ADL's "good faith." Nothing in the statute – which ADL does not even bother

---

[35] Other circuits all uniformly articulate the standard for an award of punitive damages under the Wiretap Statute as whether the defendant's conduct was "wanton, reckless or malicious." *Smoot*, 246 F.3d at 647; *Deal v. Spears*, 980 F.2d 1153, 1159 (8th Cir. 1992); *Bess v. Bess*, 929 F.2d 1332, 1335 (8th Cir. 1991); *Jacobson v. Rose*, 592 F.2d 515, 520 (9th Cir. 1978). ADL has not contested below or here that the jury was properly instructed under that standard. Petitioners imply that the scienter standard is, variously, "willfulness" (Pet. 26 n.16 (citing *Citron v. Citron*, 722 F.2d 14 (2d Cir. 1983) (per curiam))) or "reckless indifference to the requirements of the Act" (*id.* at 26). Those arguments are waived and have no merit. *Citron* addressed a prior version of section 2511, and reached the unremarkable conclusion that punitive damages could not be awarded if the defendant was not liable under the statute.

[36] ADL has waived any objection to the punitive damages instruction. Pet. App. 54a-55a. Considerable evidence apart from the good faith issue supported the punitive damages award. *See* pp. 27-28, *supra*; Pet. App. 51a-53a, 56a n.17.

to cite on this issue – supports its contention. There is no circuit conflict on this issue, nor indeed has ADL cited any case supporting its position. Contrary to ADL's assertion (at 27), *Deal* is consistent with and supports the decision below. In *Deal*, the Eighth Circuit explicitly referred to many factors considered by the district court, of which reliance on legal advice was only one. *See* 980 F.2d at 1159. In the factual context there, the court had no basis for upholding a punitive damages award because the evidence did not support a finding of "wanton, reckless or malicious" conduct. Contrary to ADL's apparent belief (at 27), differences in fact between two court of appeals cases that use the same legal standard do not present a circuit "conflict" warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JAY S. HOROWITZ
HOROWITZ, WAKE & FORBES
3950 Republic Plaza
370 Seventeenth Street
Denver, CO 80202
(303) 572-5100

LAWRENCE W. TREECE
CHARLOTTE WIESSNER
SHERMAN & HOWARD, LLC
633 Seventeenth Street
Suite 3000
Denver, CO 80202
(303) 297-2900

DAVID C. FREDERICK
Counsel of Record
KEVIN J. MILLER
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Respondents

January 27, 2004